

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32

(Union City, California)

BIMBO BAKERIES, USA

Employer

and

Case 32-RC-4661

TEAMSTERS LOCAL 78 affiliated with the
INTERNATIONAL BROTHERHOOD OF
TEAMSTERS

Petitioner

(Hayward, California)

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DECISION AND DIRECTION OF ELECTION

Upon petitions duly being filed under Section 9(c) of the National Labor Relations Act, as amended, herein called the Act, a hearing was held before a hearing officer of the National Labor Relations Board, herein the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding,² the undersigned finds:

¹ The Employer and Petitioner's names appear as stipulated at the hearing.

² The parties' briefs were considered.

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.³

2. The parties stipulated, and I find, that the Employer, a Delaware corporation with a principal office located in Fort Worth, Texas, is engaged in the manufacture, distribution, and sale of tortillas and bread products in various locations in the United States. During the twelve months immediately preceding the hearing, the Employer had gross non-retail receipts in excess of \$50,000 received directly from businesses located outside the State of California. Based on the above, I find that the Employer is engaged in commerce within the meaning of the Act. Accordingly, the assertion of jurisdiction is appropriate herein.

3. Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

4. The Petitioner claims to represent certain employees of the Employer, and a question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The Petitioner seeks to represent two separate units composed of all of the Employer's non-supervisory employees at its Union City and Hayward, California depots, including driver salespersons, relief driver salespersons, warehouse employees, and office and plant clerical employees at the respective depots. Contrary to the Petitioner, the Employer contends that one unit should consist of office and plant clerical employees at all ten depots in its Northern California Division and the other unit should consist of the driver salespersons, relief driver salespersons, and warehouse employees at the ten depots. The Petitioner and Employer also disagree about the supervisory status of the "sales supervisors" at each of the depots. The Petitioner contends that they are statutory supervisors and should be excluded from the petitioned-for units, and the Employer maintains that they are not statutory supervisors and should be included in the bargaining unit composed of driver salespersons, relief driver salespersons, and warehouse employees.

³ At the hearing, the Employer made a motion to keep Employer's Exhibits 4, 5, 6 and 11 confidential. The hearing officer accepted the exhibits "provisionally" into the record and referred the matter to the Regional Director. The hearing officer specifically informed the Employer that he was not aware of any mechanism available to keep the exhibits confidential and he invited the Employer to make some suggestions how it could be kept confidential. No suggestions were forthcoming. The Union objected to treating the exhibits as confidential. Upon review, it is concluded that there is no mechanism for keeping exhibits confidential after they have been introduced into the record. It is the responsibility of the party who is asserting confidentiality to safeguard such information. Thus, the Employer should have redacted the confidential information, if possible, or asked for an in camera inspection of the material to determine precisely which portions, if any, constituted confidential or proprietary information. In any case, the Employer's motion is denied since the exhibits have been introduced into the record and they are, therefore, public records.

The Employer produces and distributes tortilla, cake and bread products in different areas of the United States. On August 8, 1999,⁴ as part of a corporate-wide consolidation plan, the Employer officially merged several different companies that it owned in California, Arizona and Nevada into “Bimar Foods Distribution Corporation” and later renamed the company “Bimbo Bakeries USA, Inc.”. The various companies were grouped into three separate geographical divisions: Los Angeles, Southern California, and Northern California. The Los Angeles and Southern California Divisions include depots and facilities located in Southern California, Arizona, and Las Vegas, Nevada. There is no contention that any of the facilities in these two Divisions should be part of the petitioned-for units. The Northern California Division (herein called the Division) consists of nine depots in Northern California, and one in Sparks, Nevada. The nine California depots are located in Hayward, Union City, Castroville, Elk Grove, Chico, Cotati, Manteca, and two separate depots in Fresno.⁵

Prior to the consolidation, all ten of the depots in the Division were held by the Employer as separate and distinct companies. There is no bargaining history with any labor organization at any of these depots. Seven of the depots operated as “Tia Rosa Bakeries of Sacramento” and three as “Amex Distribution of Northern California”. Tia Rosa Bakeries distributed tortillas throughout California, Arizona, and Nevada and Amex distributed cake products throughout California. These companies have continued to maintain their former company names to a large extent despite being renamed “Bimbo Bakeries USA”.⁶

Staffing at the Depots

For the most part, the Division is primarily engaged in the business of distributing the Employer’s tortilla, cake, and bread products throughout the Division’s geographical jurisdiction.⁷ Because the depots are distribution centers they are staffed primarily, and in some cases exclusively, by driver salespersons and relief driver salespersons. However, some depots are also staffed by warehouse employees, plant clerical employees, and/or office clerical employees depending on the number of routes assigned

⁴ All dates herein are in 1999 unless otherwise specified.

⁵ The Division’s boundaries generally run from Visalia, California north to the California/Oregon border and includes portions of Northern Nevada. According to a mileage chart submitted by the Employer as an exhibit, most of the distances between the depots were over one hundred miles and several were over three hundred miles apart. The longest distance between two depots was 317 miles between the Sparks and Castroville depots.

⁶ For example, the letterhead on the correspondence notifying customers of the name change contains both Bimbo Bakeries’ name and Tia Rosa’s or Amex’s name. The Employer’s “Selling Division Assignments” sheet still refers to the depots as either “Tia Rosa” or “Bimbo”. Moreover, the Employer recently purchased new uniforms for its driver salespersons that contain some of its former companies’ names. Thus, each driver is issued three different shirts containing different logos – Tia Rosa, Bimbo and Mrs. Baird’s (One of the Employer’s companies located outside of the Division but its products are distributed by most or all of the depots in the Division). The driver is free to wear whichever shirt he/she wishes each day.

⁷ The Elk Grove depot which is the major distribution center for the Division is also the only facility that manufactures product (tortillas). The other depots are strictly involved in distributing the Employer’s products throughout their assigned routes.

to a particular depot. The number of routes assigned to each depot varies significantly.⁸ Thus, Elk Grove and Hayward which have the most routes also have the most employees and they are the only depots staffed by all of the different job categories. Conversely, the Chico and Cotati depots have the fewest routes and they are staffed exclusively by driver salespersons.⁹

All of the depots are assigned one or two “sales supervisors”, except for the Chico and Cotati depots where no supervisors are currently assigned because there are too few routes. The sales supervisors are in charge of the day to day operations at the depots and they are the highest-ranking personnel at the depots. The sales supervisors, driver salespersons, and relief driver salespersons are part of the “sales department”. The drivers are specifically required to report directly to the sales supervisors and to bring any work grievances to the sales supervisors’ attention for adjustment. The warehouse employees are part of the “distribution department” and they are technically under the supervision of the Elk Grove plant manager and the Elk Grove warehouse supervisor. The plant and office clerical employees are part of the “administration” and they are supervised by Monica Fabila, the Controller of the Division. Her office is also located at the Elk Grove facility. Thus, there are no supervisory personnel from the distribution department or administration at any of the depots (except the Elk Grove facility). The record establishes, however, that the warehouse and clerical employees at the depots are supervised by the sales supervisors at their respective depots.

Centralized Administration

The ten depots are grouped into three “Districts”. District 1 includes the Manteca depot and the two Fresno depots. District 2 consists of the Elk Grove, Chico, Sparks, and Cotati depots, and District 3 consists of the depots in Union City, Hayward and Castroville. Each of the districts is headed by a different District Manager (also referred to as “Sales Managers” by the Employer) and their offices are all located at the Elk Grove facility.¹⁰ The District 1 manager also has an office at one of the Fresno depots and visits each of the depots in his district at least twice per week. The District 2 manager visits the depots in his district two or three times per month, and the District 3 manager visits his depots one or two times per week. The record is silent as to the length and purpose of their visits except that some of the visits are “spot checks”. The district managers make the final decisions regarding hiring, discipline¹¹, route assignments, promotions, and overtime. All three district managers report to Frank Paladino, the General Sales Manager of the Division. Paladino’s office is also located at the Elk Grove

⁸ The number of routes per depot are as follows: Elk Grove (29), Hayward (19), Union City (15), Castroville (9), Fresno (9), Manteca (9), Fresno (8), Sparks (6), Cotati (3), and Chico (2).

⁹ Outside of the Elk Grove depot, there is only one office clerical employee in the Hayward depot and one plant clerical employee at the Hayward, Castroville, and Fresno depots (“G” Street location). There are five warehouse employees at the Hayward depot, two at the Union City depot, and one at the Sparks depot.

¹⁰ The parties stipulated that the district managers are supervisors within the meaning of the Act.

¹¹ Regarding oral warnings however, as discussed below, the record reflects that these are administered by sales supervisors without any additional review by the district managers.

facility. He attempts to visit all of the depots in the division twice per month.¹² Paladino reports directly to John Schneider, the General Manager of the Division. Schneider no longer visits the depots.¹³

In addition to housing the Division's administrative offices at the Elk Grove facility, the Division's accounting system is run through the Elk Grove facility, and accounts payable are also coordinated through Elk Grove.

The Employer maintains uniform pricing for its products on a division-wide basis. Thus, all of its customers in the Division are charged the same price for the Employer's products and the different cost-of-living rates in different parts of the Division are not taken into consideration. National promotional campaigns are developed by the Employer's national headquarters and promotional campaigns at the divisional level are developed by the Division's General Sales Manager.

Depot Operations

Tortillas are manufactured at the Elk Grove facility and are distributed to the other depots by five "transport drivers" based out of Elk Grove.¹⁴ Elk Grove also receives bread products from Los Angeles and cake products from Mexico and it distributes these products along with tortillas to the other depots for final distribution to the Employer's customers. The transport drivers make about two deliveries per week to the Hayward depot, at least five deliveries per week to the Union City depot, no deliveries to one of the Fresno depots (the "G" Street facility), and five deliveries per week to the other depots. The Hayward and Fresno ("G" Street facility) depots also receive some or all of their cake products directly from Mexico, and the Union City depot receives bread products directly from Los Angeles.¹⁵

In general, the driver salespersons (herein referred to as "drivers") arrive at their respective depots in the morning to load their trucks with the products for delivery. In those depots where there are warehouse employees, the product may be left behind the truck by warehouse employees and the drivers load their trucks unassisted unless a

¹² There was conflicting evidence in the record regarding the frequency of visits by Paladino to the depots. According to the employees who testified at the hearing, they recall seeing him at the Union City and Hayward depots far fewer times. Regardless of the conflicting testimony, it is evident that Paladino does not visit the depots with any regularity.

¹³ The human relations department is also located in Elk Grove. All of the depots' personnel files are kept there. The head of the human relations department has authority over all 10 depots regarding personnel matters and he "occasionally" visits the depots. The record does not establish more precisely how frequently he visits the depots.

¹⁴ Unlike the driver salespersons, transport drivers are part of the distribution department and they are not paid on a commission basis. Neither party contends that the transport drivers should be included in either of the proposed units.

¹⁵ Unlike the other depots, the Hayward depot and the Fresno depot ("G" Street facility) only distributes cake products and some candy on all of their routes. The other depots distribute all of the Employer's products by allotting some of their routes exclusively for tortillas or cake products while other routes deliver all of the products (commonly referred to as "combination" routes).

warehouse employee is available to assist them. In other depots, such as Hayward, the trucks are already loaded by warehouse employees. In either case, the drivers check the “load sheet” prepared by the warehouse employee to make certain that it accurately reflects the product that was loaded onto the truck and they verify that the load sheet is consistent with the “order sheet” prepared by the driver the previous day. They discuss and resolve any discrepancies with the warehouse employees and the driver signs-off on the load sheet after they verify the load. Then the drivers leave the depot to deliver the product to the various customers on their routes. The entire loading and verifying process takes between 15 and 30 minutes depending on the type of product that is being loaded.¹⁶

The drivers deliver the product to each of the stops on their route.¹⁷ They restock the product if necessary at each of the customer stops and take new orders for future delivery. It is rare for a driver to return to the depot to pick-up additional product. Thus, drivers spend most of their workday out on their routes. After they finish their respective route, the drivers return to the depot where they unload their trucks. They take an inventory of the products left in their trucks, if any, and determine which products can be used for future deliveries and which products must be discarded. The drivers then consolidate all of the orders they generated at each stop on their route and they telephone or fax the consolidated orders to Elk Grove for future delivery.¹⁸ Once Elk Grove receives the orders from the various depots, it relays the orders to the Employer’s manufacturing plant in Mexico for cake products or to its Los Angeles Division for bread products. Elk Grove processes the tortilla orders at its own facility.

After the drivers return to the depot, they organize the money orders, checks, credit invoices, cash invoices, and charge invoices they generated during their deliveries and they prepare a “consolidated settlement report” that essentially summarizes their sales and credits. The settlement report is then turned over to the cashier at their depot, if any, along with the invoices, checks, and money orders.¹⁹ The cashier verifies that these items balance out and then consolidates the various settlement reports from all of the drivers and deposits the tally into a locked “depot bag”, along with the invoices, checks and money orders. The cashier returns the settlement report to the drivers for correction if he/she discovers any errors. The depot bag is then sent to Elk Grove at the end of each day where all of the depot bags from the various depots are collected and balanced. The drivers generally spend about one hour to one and a half hours at the depot preparing their paperwork after they return from their routes.²⁰

¹⁶ Cake products are easier to load than tortilla because tortillas are heavier and, unlike for tortillas, trays and racks are used in the loading and transporting of cakes.

¹⁷ Relief drivers generally replace regular drivers who are on vacation, sick leave, or some other leave. Relief drivers are assigned to a particular depot but are occasionally called upon to make deliveries of products or equipment to other depots.

¹⁸ Tortillas and bread products must be ordered six days in advance of the delivery date and cake products require 10 days advance ordering.

¹⁹ “Cashier” is the job title given to the Employer’s plant clerical employees.

²⁰ At depots where there is no cashier, the drivers simply deposit their settlement reports, invoices, checks, and money orders directly into the depot bag and send it to Elk Grove.

Working Conditions at the Depots

Because the depots were all formerly held as separate and distinct companies by the Employer, they continue to have separate and distinct working conditions for the depot employees. There is no dispute that there is no uniform pay plan in the Division and that the benefits available to employees vary depending on whether they work for a Tia Rosa or Amex facility. Thus, policies relating to holidays, vacation, sick pay, personal leave, life insurance, and health insurance vary at each of the depots.²¹

All driver salespersons are compensated on a commission basis and the commission rates are the same for all drivers. Drivers earn 10 percent commission on the sale of tortilla and bread products, and 15 percent on all cake products. They earn no overtime pay. Nonetheless, drivers' earnings are largely dependent on the type of route that they are assigned. Thus, for example, urban routes are frequently more profitable than rural routes since the customer stops are generally closer and the driver can generate more sales. Moreover, drivers who only deliver a single type of product will obviously earn a different commission rate than drivers who deliver a different product or who have combination routes.

Relief drivers are also paid according to the Employer's commission system if they work the same route for more than two weeks. Otherwise, relief drivers receive a base pay of about \$400 per week plus overtime pay.²² Cashiers and office clerical employees are hourly employees but the record does not establish their hourly wage rates. Warehouse employees are paid between \$8 and \$10 per hour depending on their work experience with the Employer and the specific warehouse position they hold ("loader/receiver/stager"). The record establishes, however, that the workload at a particular depot is also taken into consideration in setting the wage rate for warehouse employees. Thus, the amount earned by warehouse employees (like drivers) is dependent on the depot where they work.²³

The hours of work for drivers and warehouse employees also vary at each depot. At some depots, the drivers' starting times are staggered and at other depots they all start at the same time. Most drivers arrive at work between 4:30 and 5:30 a.m. and they return to the depot at different times in the afternoon. The hours of work for warehouse employees also vary according to the operational needs of the particular depot. Thus, warehouse employees generally work different shifts even within their own depots.

²¹ The Employer presented evidence that it was in the process of implementing new policies that would make many of these benefits uniform throughout the Division and it contends that some of these changes are scheduled to be implemented in late-1999 and others in early-2000.

²² There was conflicting evidence presented by the parties regarding the amount of the base pay and whether regular driver salespersons also earn a base pay whenever their weekly commission earnings fall below the base pay rate. Reconciling these conflicts is unnecessary since the record establishes that driver salespersons regularly earn commissions in excess of the base pay figure.

²³ The Employer pays all of its employees out of the same payroll and they receive the same type of paycheck.

Conversely, plant and office clerical employees work set hours. Cashiers work from about 10:00 a.m. to 6:00 p.m. and office clerical employees work 8:00 a.m. to 5:00 p.m.²⁴

There are currently different employee handbooks at some of the depots and no employee handbooks at others. The Elk Grove, Union City and Hayward depots all have different employee handbooks. Not surprisingly, therefore, there are separate seniority lists kept at each depot for purposes of scheduling vacations and/or for awarding open routes to the drivers who apply for them.

Interchange of Personnel, Product, and Equipment

A transfer of employees between depots is a “very rare” occurrence according to Frank Paladino, the general sales manager. Paladino could only recall two permanent and two temporary transfers among the drivers during his approximately four-year term of employment with the Employer. All of these transfers were apparently voluntary. He did not know of any permanent or temporary transfer of warehouse employees, and he could only recall one occasion when a clerical transferred to another depot. In May, the Hayward cashier volunteered for a four-week transfer to the Castroville depot.

Paladino also testified about two drivers from the Union City depot and one driver from the Hayward depot who were called upon to assist two local depots by running some of their routes for several months. The evidence adduced at the hearing established that these drivers were not transferred to the other depots since they continued to do all of their paperwork at their regularly assigned depots.²⁵ It also appears that the assistance that was given to the two depots is not likely to be repeated since one of the depots (located in Vallejo, California) has been closed and the other (Cotati) was historically operated out of the Union City depot prior to the corporate consolidation and it is now in a different District and it is fully staffed. Moreover, there is no evidence that this kind of assistance has ever been provided on any other occasion or at any other depot.

Paladino also testified that relief drivers are occasionally called upon to deliver products to other depots when they experience a shortage. According to Paladino, this inter-depot transfer of product occurs “regularly” but he only discussed transfers that emanated from the Union City and Hayward depots. He testified that products are transferred out of Union City to local depots about four to six times per month and about

²⁴ Warehouse employees and clerical employees use a time clock to record their arrival and departure times. Drivers do not record their hours of work since they are paid on a commission basis. The sales supervisors are responsible for signing-off on the timecard entries made by the warehouse and clerical employees before the timecards are sent to Elk Grove.

²⁵ Paladino testified that these employees did their paperwork at the Cotati and Vallejo depots and that they occasionally picked up the product at those depots. However, two of the drivers who were involved in providing assistance to the other depots testified that all of the drivers continued to perform their paperwork at their home depots. They also testified that one of the drivers was hired to work at the Cotati depot and he was simply being trained by a Union City driver to perform that route. The employee-witnesses also established that the Union City drivers continued to pick up the product at the Union City depot.

six to eight times per month out of the Hayward depot. Transfers to more distant depots from the Union City depot occur only about once every two or three months. The record is silent about the more distant transfers from the Hayward facility. However, Paladino conceded that inter-depot transfers emanating from these two depot are generally limited to the depots in District 3 and “sometimes” Cotati, all of which are located within 84 miles of Union City or Hayward. Thus, contrary to Paladino’s assertions, the record does not establish that there is any “regular” inter-depot transfer of products throughout the Division.

Depots also interchange vehicles and equipment. According to Paladino, one depot can loan a vehicle to another depot if the lending depot can spare it. However, the borrowing depot can simply rent a vehicle if no vehicle is available. Depots can also exchange display racks and fixtures in case of shortages. Paladino did not establish how frequently depots exchange vehicles or equipment and he did not give any specific examples of these exchanges.

Sales Supervisors

The sales supervisors’ primary responsibility is to make certain that the daily routes are covered by drivers and to handle any customer complaints that a driver is unable to resolve. Thus, when a driver is unable to run his/her route, the sales supervisor assigns a relief driver to cover the route. Supervisors also recommend the number of routes that should be assigned to a depot and they recommend which drivers should be assigned those routes. The record does not establish how often the recommendations are followed by the sales manager. Also, drivers call the sales supervisors if they need to miss work and when they need to adjust a work grievance.

Another of the sales supervisors’ primary responsibilities is to make certain that company promotional programs are implemented on all routes and that company policies and procedures are implemented, including ensuring that the drivers are dressed in a professional, presentable manner. In this regard, supervisors are authorized to issue verbal warnings to employees based on their own judgement.²⁶ The record reveals that a sales supervisor’s decision to issue a verbal warning is not subject to review. Although sales supervisors do not have the authority to issue written warnings, they sign the written warnings and they are present at all disciplinary interviews and termination interviews.²⁷ According to Frank Paladino, sales supervisors are required to make sure that the disciplinary process is done properly.

²⁶ For example, in April, the Employer conducted a training meetings attended by all of the driver salespersons and supervisors in the Division. Employees who failed to attend the meeting without a valid excuse were issued verbal “counseling” from their supervisors for “failing to follow a directive.”

²⁷ The Employer uses a progressive disciplinary system at all of its depots in the Division. The first step of the system is a verbal warning (also referred to as a “verbal counseling”). A written warning is issued for a second violation of the same offense. Written warnings are issued by the sales managers. A second written warning can result in a suspension and the final step is termination.

Sales supervisors are also involved in hiring employees. They interview prospective employees by telephone and determine which applicants will be invited to a face-to-face interview with the sales manager and supervisor. Thus, sales supervisors have the discretion to screen out undesirable applicants based entirely on their own judgment. The sales supervisors participate in the face-to-face interviews and make recommendations regarding the applicants. Their recommendations are generally followed about 85 to 90 percent of the time.

Sale supervisors train new personnel and make certain that sales personnel have an appropriate appearance. At the Union City depot, the sales supervisors prepare performance evaluation for the drivers three times per year but at the Hayward depot the sales managers prepare the evaluations.²⁸ The record does not establish if other sales supervisors also prepare evaluations. These evaluations are relied upon, along with an employee's length of service with the Employer, in determining which drivers are awarded available routes and consequently the amount of money earned.²⁹

Sales supervisors also run routes themselves with a regularity that varies from depot to depot. In Hayward, sales supervisors run routes about 25% of the time while in Union City they run routes about 10 or 15% of the time. The record does not disclose any information regarding the method or amounts of compensation for the sales supervisors.

At depots with clerical employees and/or warehouse employees, the supervisors have authority to issue directives to these employees even though they are technically in different departments. Thus, Frank Paladino referred to the sales supervisors as supervisors in "management status" with the authority to direct the warehouse employees when necessary to transfer product from the warehouse to sales. According to Paladino, sales supervisors subsequently inform the warehouse supervisor in Elk Grove of the directives he gave to the warehouse employees but he did not indicate that the Elk Grove supervisors have the authority to overrule the sales supervisors' directives. Paladino also acknowledged that sale supervisors have the authority to deal with clerical employees if necessary, including sending them home if he/she perceives that it is necessary for safety considerations. In fact, all employees at a depot are required to go to the sales supervisors if they have to leave early. However, the record does not establish whether they have the authority to grant their requests without conferring with someone else. Sales supervisors are responsible for signing-off on the entries made by clerical and warehouse employees on their timecards before the timecards are sent to Elk Grove.

²⁸ The Union City sales supervisors are Joel Diaz and Fernando Hernandez. Arturo Haro and William Campusano are the sales supervisors at the Hayward depot.

²⁹ Each driver salesperson is assigned one route and the route they are assigned dictates how much they are likely to earn since each route differs with respect to the number of stops per route, the difficulty of the deliveries, and the type of product that is delivered. Thus, it is clearly important to get favorable performance evaluations so that a driver can get a desirable route when it becomes available.

Thus, it is clear that the Employer has made the sales supervisors responsible for the daily operation of the depots.³⁰

ANALYSIS

A single-facility unit is presumptively appropriate when dealing with a multi-facility operation. The presumption in favor of a single location unit can only be overcome “by a showing of functional integration so substantial as to negate the separate identity of a single-facility unit.” *Bowie Hall Trucking*, 290 NLRB 41, 42 (1988); *RB Associates*, 324 NLRB 874 (1997). The Board looks to such factors as central control over daily operations and labor relations, skills and functions of the employees, general working conditions, bargaining history, employee and equipment interchange, and the geographic location of the facilities in relation to each other. *Napa Columbus Parts Co.*, 269 NLRB 1052 (1984); *Queen City Distributing Co., Inc. t/a Sol’s*, 272 NLRB 621 (1984). The burden is on the party opposing the single-facility unit to present evidence overcoming the presumption. *J&J Plate, Inc.*, 310 NLRB 429 (1993); *Esco Corp.*, 298 NLRB 837 (1990).

The Employer contends that the facts of this case are sufficient to overcome the single-facility presumption. The Employer’s contention is based on its belief that the undersigned should assess the employees’ community of interest after the Employer’s consolidation plans are complete rather than as they currently exist. The Employer further contends that the record evidence demonstrates that the consolidation plan and its effects are sufficiently definite to assess the relevant employees’ future community of interests. The Employer does not cite any legal authority for its contention that a prospectively-based analysis of employees’ community of interest should be applied herein.

Instead, the Employer analogizes this case to the “expanding unit” line of cases to support its argument that the employees’ community of interests should be analyzed after the consolidation is complete. The “expanding unit” line of cases is patently inapposite to the situation in the instant case. In those cases, the primary issue is whether a “sufficiently substantial and representative” employee complement exists so that a substantial number of employees will not be unreasonably disenfranchised. In the instant case, there is no issue relating to the potential disenfranchisement of employees since petitions can be filed on behalf of other units of employees. Thus, the Employer has failed to establish any legal basis for its contention.³¹

³⁰ Employee Sergio Mora testified that he was hired as a relief driver and that he spent his first week and a half working in the warehouse and that the sales supervisors directed his work and showed him how to transport product. Other employees testified that the warehouse and clerical employees are directed and supervised by the sales supervisors. This further illustrates the sales supervisors’ overall responsibilities for the depot.

³¹ In addition, the record evidence does not support the Employer’s contention that the consolidation plan is “sufficiently definite” so that the undersigned should rely on the facts as they will exist upon the completion of the consolidation. Instead, the record confirms that many portions of the consolidation plan are speculative and are still being formulated. In this regard, a new employee handbook has been approved

A review of the facts, as they existed at the time of the instant hearing, supports a finding that the single-facility unit presumption has not been rebutted. In this regard, the record is clear that the general working conditions for employees working in the Division vary significantly from depot to depot. Thus, there is no uniform pay plan in the Division and earnings by the drivers and warehouse employees are dictated to a large extent by the depot where they work. Employees also receive different holidays, sick pay, personal leave, life insurance and health insurance. In fact, some depots are covered by different employee handbooks and other depots have no handbook at all.³² In addition, there are no standard work hours for drivers or warehouse employees throughout the Division and seniority is based on an employee's tenure with a particular depot, not division-wide. Finally, each of the depots is staffed by a different number of employees and the staff composition is vastly different. Thus, some depots consist of only 2 or 3 employees while others have 18 to 29 employees. More importantly, some depots are staffed exclusively with drivers while other depots include drivers, relief drivers, warehouse employees, office clerical employees, and/or plant clerical employees. It is obvious from these facts alone that employees working at the different depots lack a community of interest.

The distance between the depots is another factor that weighs against a multi-facility unit. The depots are separated in most cases by more than 100 miles and in some cases by more than 300 miles. In fact, the Sparks depot is located in a different state. Further, some of the depots service heavily populated urban areas and others service more rural areas. Thus, the earning potential for drivers is directly affected by the differences in the routes since there will be fewer opportunities to make sales in less populated and more spread out areas.³³

by the Employer to be administered nationally and it is anticipated that the non-economic provisions in the handbook will be implemented beginning in November and the economic provisions will go into effect in January 2000. However, James Hood, the Division Director of Human Relations, conceded that the current draft of the handbook contains significant mistakes and that the Employer is considering making revisions to the handbook. The Employer has also decided to consolidate the Hayward and Union City facility (as well as the two Fresno facilities) but cannot do so until it finds a new location for the consolidated operation and until it resolves sublease issues. The Employer also hopes to integrate its routes by reconfiguring its delivery trucks so that they can accommodate all of its products. However, the Division's General Manager testified that this is a long-term plan and that the company is just beginning to test some reconfigured trucks. Thus, it is axiomatic that plans frequently change no matter how definite they may seem at a particular time. To further illustrate this point, the Division's General Manager testified that the initial Northern California Sales Consolidation Plan was approved in May and it included a depot in Bakersfield, California. However, the plan was subsequently changed and the Bakersfield depot was moved to the Los Angeles Division.

³² The variances in working conditions at each of the depots are due in large part to the fact that the depots were previously held by the Employer as separate companies and there is no bargaining history at any of the depots or any combination of depots in the Division.

³³ The Employer relies on *Dayton Transport Corp.*, 270 NLRB 1114 (1984), to support its contention that a multi-facility unit is appropriate in spite of the vast distances between the facilities. Its reliance on this case is misplaced. *Dayton Transport Corporation*, unlike the instant case, involved employees who shared uniform wages and fringe benefits, and there was regular interchange of employees and equipment between the facilities.

In light of the vast distances between the depots, it is not surprising that there are so few examples of employee interchange. The only examples are isolated incidents limited to the San Francisco Bay Area. There was also some generalized testimony about relief drivers delivering products and equipment to other depots. However, the record does not adequately establish the frequency of this occurrence. Moreover, relief drivers generally deliver to depots in close proximity to each other and they only constitute about 11 percent of all drivers. Thus, the vast majority of employees at the depots never experience any integration with other depots and most of the interchange occurred within the same district in the Division. The record also establishes that there have been two permanent and two temporary transfers among drivers and one temporary transfer of a plant clerical. All of these transfers were on a voluntary basis. These relatively few examples of interchange are inadequate to meet the Employer's burden to establish a regular and substantial pattern of employee interchange. See *J&J Plate, Inc.*, supra.

The Employer did establish, however, several factors that militate against a single-facility unit. For example, it established that its administrative operations and its labor relations policy are centrally determined. Most of the personnel decisions including hiring, firing and disciplining are also centrally determined by the district manager and/or human relations director. There is also some functional integration in the distribution process primarily between the Elk Grove depot and the other depots.

Yet, despite the central control of administrative operations and labor relations, it is apparent that Respondent relies on the sales supervisors to oversee the depot operations and it has granted them the authority to effectively supervise the personnel. This is significant since the depots are far apart, and the Employer's managers are not onsite and visit infrequently. Specifically, the supervisors are authorized to interview job applicants telephonically and they have the discretion to eliminate applicants from further consideration. They also participate in face-to-face job interviews and make recommendations regarding the hiring of job applicants. Their recommendations are followed about 85 to 90 percent of the time. They issue verbal warnings to employees when they fail to follow company directives or policies and they participate in all disciplinary and termination interviews. They train employees and in some cases prepare employee performance evaluations. Finally, the record evidence establishes that supervisors direct all of the depot employees, including warehouse and clerical employees and depot employees are expected to go to the sales supervisors with work grievances and other exigencies that arise at the depot. In these circumstances, it is evident that the sales supervisors are responsible for overseeing the depot operations. Thus, the Employer has failed to establish a lack of autonomy at the individual depots. See *J&J Plate, Inc.*, supra; *Esco Corp.*, supra

Although a few factors favor the broader unit urged by the Employer, on balance the evidence presented does not establish that the depots have been so effectively merged into a more comprehensive unit, or are so functionally integrated that they have lost their separate identity. *Id.* Therefore, based on the foregoing, and the record as a whole, I conclude that the petitioned-for Hayward and Union City depots are each an appropriate

unit.³⁴ Having reached this conclusion, it is necessary to examine relevant community of interest factors between the employees in the different job classifications at each of the two depots.

The Union City depot is comprised of about 15 drivers, 2 relief drivers and 2 warehouse employees. There are no office and plant clerical employees. There is no need to detail all of the facts that demonstrate that these employees share a community of interest since the parties are in agreement that depot drivers, relief drivers and warehouse employees share a community of interest and should be included in the same unit. Moreover, the record supports the parties' contentions that they are an appropriate unit. Among other things, drivers and relief drivers perform essentially the same work tasks and their jobs require the same skills. All three job classifications are called upon to participate in the loading of the sales trucks and at least one relief driver was required to work in the warehouse for a week and a half when he began working for the Employer. Based on the foregoing, and the record as a whole, I conclude that the strong community of interest shared among the drivers and warehouse employees at the Union City depot mandates their inclusion in one bargaining unit.

The Hayward depot is comprised of 19 drivers, 2 relief drivers, 5 warehouse employees, 1 office clerical employee, and 1 plant clerical employee (a cashier). As previously discussed, there is no dispute that the drivers, relief drivers and warehouse employees share a community of interest. However, the parties disagree on whether the clerical employees share a community of interest with the drivers and warehouse employees.

The office clerical employee works in the front of the depot in the reception area. The sales supervisors' offices separate his/her work area from the warehouse. The drivers perform their paperwork in the salesroom area which is located next to the supervisors' offices, between the reception area and the warehouse. The warehouse employees work in the warehouse and the cashier has an office in the back of the warehouse. As previously discussed, all of the depot employees are supervised by the sales supervisors at the depot even though the clerical employees and warehouse employees are not part of the sales department and technically report to managers in Elk Grove.

The cashier has daily contact with all of the drivers after they complete their sales routes. The drivers prepare their "consolidated settlement reports" and organize their invoices, checks and money orders that were generated on their routes. They then submit all of these documents to the cashier who is responsible for reviewing the drivers' reports and making sure that they balance. If the reports do not balance, he/she returns the reports to the respective driver for correction. At the end of each day, the cashier sends all of the documents submitted by the drivers to the Elk Grove facility for processing.

³⁴ In reaching this conclusion, I need not consider whether a unit consisting of one or more of the Division's districts would be a more appropriate unit. It is well settled that the Board's task in determining the appropriateness of a unit is not to determine the most appropriate unit, but simply whether the unit sought by the petitioner is an appropriate unit. *Overnite Transportation Co.*, 322 NLRB 723 (1996)

The office clerical employee answers the drivers' questions regarding customers' bills and directs messages to personnel at the depot. Thus, this employee's job duties bring him/her into contact with the other employees at the depot. The office clerical employee also performs duties that are directly related to the sales department including preparing sales reports, business reviews, and accounts payable and receivable. Like the drivers and cashier, he/she must also have bilingual skills.

In these circumstances, it is evident that the cashier has daily contact with the drivers and performs work functions that are directly integrated with the drivers' duties. The cashier's office is located in the warehouse and drivers come to his/her office when submitting their documents at the end of the day. Moreover, the cashier is under the same daily supervision as the drivers and warehouse employees and he/she performs work that is directly related to the sales department operations. The record also establishes that the cashier shares some similar qualifications as the drivers and warehouse employees since their jobs require some math skills and the ability to speak Spanish. I conclude, therefore, that the cashier shares a sufficient community of interest with the drivers to include him/her in the unit herein found appropriate.

Like the cashier, the office clerical employee's work functions bring him/her in direct contact with the other depot employees albeit not on a daily basis. Moreover, the office clerical employee performs work that is directly related to the sales department operations and they are also supervised by the sales supervisors. Thus, the office clerical employee arguably shares a sufficient community of interest with the other employees in the Hayward depot. In any case, it is appropriate to include the office clerical employee in the unit herein found appropriate since he/she would otherwise be the only unrepresented employee at the depot. *South Carolina Education Association*, 240 NLRB 542, 544 (1979).

Regarding the supervisory status of the sales supervisors, in determining whether a person is a statutory supervisor, the Board holds that a person must possess, only one of the specific responsibilities listed in Section 2(11) of the Act. Applying Section 2(11) to the duties and responsibilities of any given person requires that the Board determine whether the person in question has authority to use independent judgment on matters that are more than routine and to do so in the interest of management. *Union Square Theatre Management, Inc.*, 326 NLRB No. 17 (1998). The uncontradicted record evidence shows that the sales supervisors have the unfettered discretion to issue oral warnings which are part of a progressive disciplinary system. Additionally, the sales supervisors in the Union City depot prepare performance evaluations. These evaluations are relied upon in awarding sales routes to the drivers. Additionally they take part in the hiring process by doing initial screenings, participating in interviews, and making recommendations for hire which recommendations are followed a vast majority of the time. They also assign work to relief drivers, adjust grievances, generally direct employees and ensure overall compliance with company policies and procedures. All of these responsibilities are left to their sole discretion as the highest-ranking individuals at the depots. Moreover, it is clear that the Employer has placed the sales supervisors in a position to make independent judgements in dealing with and directing the depot staff. Put another way, if

the sales supervisors are not statutory supervisor, there would be no onsite supervision for the depot staff. In these circumstances, it is evident that they are statutory supervisors. *DST Industries*, 310 NLRB 957 (1993); *Laser Tool, Inc.*, 320 NLRB 105 (1995). Based on the foregoing and the record as a whole, I find that Joel Diaz, Fernando Hernandez, Arturo Haro, and William Campusano are statutory supervisors.

The following employees of the Employer constitute units appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

Including: All full-time and regular part-time driver salespersons, relief driver salespersons, and warehouse employees employed by the Employer at its depot located in Union City, California.
Excluding: Guards, and supervisors as defined in the Act.

Including: All full-time and regular part-time driver salespersons, relief driver salespersons, warehouse employees, plant clerical employees, and office clerical employees employed by the Employer at its depot located in Hayward, California. Excluding: Guards, and supervisors as defined in the Act.

There are approximately 19 employees in the Union City bargaining unit and approximately 28 employees in the Hayward bargaining unit.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the units found appropriate at the time and place set forth in the Notice of Election to be issued subsequently, subject to the Board's Rules and Regulations.³⁵ Eligible to vote are those in the unit who are employed during the payroll period ending immediately preceding the date of the Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States Government may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible to vote shall vote whether or not they desire to be represented by, TEAMSTER LOCAL 78 AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS.

³⁵ Please read the attached notice requiring that election notices be posted at least three (3) days prior to the election.

LISTS OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties in the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969); *North Macon Health Care Facility*, 315 NLRB 359, 361 fn. 17 (1994). Accordingly, it is hereby directed that within seven (7) days of the date of this Decision, two (2) copies of an election eligibility list for each appropriate unit involved herein containing the full names and addresses of all the eligible voters in each respective unit shall be filed by the Employer with the undersigned, who shall make the lists available to all parties to the election. In order to be timely filed, such lists must be received in the NLRB Region 32 Regional Office, Oakland Federal Building, 1301 Clay Street, Suite 300N, Oakland, California 94612-5211, on or before, November 8, 1999. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570. This request must be received by the Board in Washington by November 15, 1999.

Dated at Oakland, California this 1st day of November, 1999

/s/ James S. Scott

James S. Scott, Regional Director
National Labor Relations Board
Region 32
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